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No. 85-2087

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

MILTON M. LAWRENCE and
HELEN F. LAWRENCE,

Petitioners,

vs.

ADVANCED PATENT
TECHNOLOGY, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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A.P.T. FINANCIAL CORPORATION,
NEVADA CORPORATIONS

QUESTION PRESENTED

Whether a speculator whose alleged reliance has been disproven can establish a Rule 10b-5 violation?

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LIST OF PARTIES

Respondent Gaming and Technology, Inc. ("GTI"), formerly known as Advanced Patent Technology, Inc., is a Nevada corporation; all of its subsidiaries are wholly-owned, and it is not a subsidiary of any corporation. Respondent A.P.T. Financial Corporation is a Nevada corporation and a wholly-owned subsidiary of GTI. Respondent Jack D. Solomon was the president of GTI at the time of the conduct complained of by petitioners Helen and Milton Lawrence.

Petitioners are wrong in contending that Diversified Gaming and Technology, Inc. and International Technical Development Corp. are respondents. Both were dismissed on stipulaton of counsel at trial. (Supplemental Appendix to Petition for Writ of Certiorari, Findings of Fact and Conclusions of Law (henceforth referred to as "Findings and Conclusions"), page 2, Finding 6).

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is attached at Appendix A to petitioners' Petition. The District Court's Judgment and the District Court's Findings of Fact and Conclusions of Law are set forth in the subsequently filed Supplemental Appendix to Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction is not disputed.

STATUTES INVOLVED

The Petition involves Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder.

STATEMENT OF THE CASE

The factual background of this matter is set forth in detail in the District Court's Findings and Conclusions. In summary, petitioners bought and sold thousands of shares of the unregistered common stock of GTI commencing in 1968; in early 1980, they realized a profit of about

$140,000.00. They understood the risks involved in purchasing and selling unregistered common stock and understood they were gambling. They knew that GTI had never made a profit and that its only source of income was from the sale of unregistered shares. They knew that Jack Solomon, then GTI's president, exaggerated in communicating with petitioners concerning their purchase of shares, and they did not believe much of what he said about GTI and its prospects. (Findings and Conclusions, pages 2-3, Findings 7-13).

In April of 1980, the Securities and Exchange Commission ("SEC") commenced a private investigation concerning GTI, but none of the defendants knew the scope of that investigation before July of 1980. (Findings and Conclusions, page 4, Finding 16). In May and June of 1980, the Lawrences purchased 50,000 shares of GTI's unregistered common stock, and the District Court expressly found that they did not rely in any way on what defendant Jack Solomon said or did not say in connection with their investment decisions. (Findings, page 3, Findings 14 and 15). On July 2, 1980, GTI issued a press release indicating the existence of the SEC investigation. A *Wall Street Journal* article reflecting the investigation appeared on July 3, 1980. Announcement of the SEC investigation made no impact on the price of GTI's publicly-traded shares. (Findings and Conclusions, page 4, Finding 17).

In July of 1982, the Lawrences brought an action for securities fraud based on the failure to disclose the pending SEC investigation. At trial, Mr. Lawrence testified that he would not have purchased the GTI stock if Mr. Solomon had told him about the SEC investigation. (Appendix A, page A-3). The District Court expressly concluded that none of the information or facts known by any defendant at

the time of plaintiffs' purchases in May and June, 1980, was material for disclosure purposes and that no defendant omitted to state any material facts necessary to make what had been said not misleading. The District Court expressly found Mr. Lawrence's testimony that he would not have bought the stock if he had known of the SEC investigation not credible. The District Court expressly found no scienter, no causation, no materiality and no reliance. (Findings and Conclusions, pages 5 and 6, Findings 27 through 31 and Conclusions 2, 3, 4, and 5).

The Court of Appeals for the Ninth Circuit in affirming the District Court focused only on the issue of reliance. The Court of Appeals discussed Mr. Lawrence's trial testimony to the effect that he was aware of the risks involved, was gambling, was aware that Mr. Solomon was "a drummer" and that he exaggerated, that Mr. Lawrence did not believe much of what Mr. Solomon said and that Mr. Lawrence had testified at his deposition that before the purchases he knew the SEC had raised questions about GTI's sale of restricted shares. The Court of Appeals noted the District Court's having expressly found not credible Mr. Lawrence's testimony that he would not have purchased the stock had he known of the SEC investigation. The Court of Appeals concluded that the District Court's finding that the plaintiffs would have acted the same had they known the truth was not clearly erroneous and affirmed without discussing the District Court's conclusions that plaintiffs had not established materiality, scienter, causation or damages.

REASONS FOR DENYING THE WRIT

1. Petitioners' Argument Is Predicated On A Finding Of Materiality And Ignores The Fact That The District Court Found An Absence Of Materiality.

Petitioners' entire argument is predicated upon an asssumption that the allegedly withheld information was material. In that regard, the Question Presented in the Petition is phrased in terms of a material omission, and the argument in the Petition likewise relates only to material omissions. The Lawrences either overlook or ignore the fact that the alleged omissions involved in this case were expressly found to be not material. (Findings and Conclusions, page 6, Conclusion 2). Accordingly, petitioners' entire argument is specious and must fail.

2. No Conflict Of Decision Exists Between The Second And Ninth Circuits.

Petitioners correctly recognize that the Ninth Circuit Court of Appeals has concluded that a rebuttable presumption of reliance arises upon a showing of materiality in a 10b-5 case. *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 789 (1980). Petitioners then attempt to create an apparent conflict between the circuits by arguing that Judge Mansfield in his concurring and dissenting opinion in *Chris-Craft Industries v. Piper Aricraft Corp.*, 480 F.2d 341 at 399-400 (2nd Cir., 1973) suggested that reliance is established as a matter of law rather than pursuant to a presumption once materiality has been shown.

Petitioners overlook the fact that Judge Mansfield's view is not that of the majority opinion. (*See* 480 F.2d at 375).

They also ignore the fact that Judge Mansfield's view is not that of the Second Circuit. (*See, e.g., Lewis v. McGraw*, 619 F.2d 192, 195 (2ndCir., 1980)).

Petitioners attempt to bolster their argument by erroneously suggesting that in *Herbst v. I T & T*, 495 F.2d 1308 (2nd Cir., 1974) Judge Lumbard's reference in footnote 14 (495 F.2d at 1316) was an endorsement of Judge Mansfield's view. Judge Lumbard noted that both *Chris-Craft* and *Herbst* involved exchange offers in which the issue of reliance related to whether a large number of shareholders would have voted differently in approving exchange offers had they known of allegedly omitted material facts. In *Herbst*, Judge Lumbard pointed out that in the context of an exchange offer it would be extremely difficult to prove how shareholders in the aggregate would have reacted had they known of the omitted facts, but he did not hold or suggest that the presumption of reliance was conclusive.

Both *Chris-Craft* and *Herbst* are clearly distinguishable from this case. Herein, proof of the absence of reliance not only was practical but, more importantly, was established. Accordingly, any support that the Lawrences could have received from their interpretation of *Chris-Craft* and *Herbst* is illusory.

3. Petitioners' Urged Interpretation Of The Law Would Abolish Reliance As An Element Of A Rule 10b-5 Violation.

Herein, since reliance has been disproven, petitioners could prevail only if reliance were no longer an element of a Rule 10b-5 violation. Accordingly, they are arguing that it should be conclusively presumed once materiality (which

does not exist in this case) has been established. The effect of their urged interpretation is to abolish reliance as an element. While reliance may be difficult to prove or disprove in certain situations such as exchange offers or open-market transactions, it is readily susceptible of proof in factual situations such as this. Accordingly, causing the drastic change urged by petitioners is unnecessary. Moreover, since an obvious effect of such a change in the law would be to provide a fraud remedy to speculators like the Lawrences who were not defrauded, such a change is unwarranted and unwise.

CONCLUSION

For the above reasons, the Writ should be denied.

Respectfully submitted,

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GAMING AND TECHNOLOGY, INC., AND A.P.T. FINANCIAL CORPORATION